Gunalan a/l Pechimutu v Pacific & Orient Insurance Co Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-04(IM)-493–10 OF 2022, J-04(IM)-579–12 OF 2022 AND J-04(IM)-580–12 OF 2022
RAVINTHRAN, CHOO KAH SING AND AHMAD KAMAL JJCA
25 APRIL 2025

Civil Procedure — Intervener — Right to intervene — Application by insurer to intervene in negligence suit in sessions court — High Court allowed insurer's appeal against sessions court's dismissal of application to intervene — Whether High Court's orders were not ruling and 'non-speaking' judgments — Whether insurer could intervene in negligence suit — Whether sessions court's proceeding had concluded — Whether insurer was estopped from filing application to intervene — Whether High Court's policy invalidation order and dismissal of insurer's suit had any effect — Whether insurer abused court's process

These three appeals ie Appeals 493, 579 and 580 came before the court after being ordered to be re-heard by the earlier review panel. Regarding Appeal 493, the plaintiff was involved in an accident with the defendant. The plaintiff suffered severe injuries and commenced personal injuries and pecuniary losses claim against the defendant at the sessions court ('Suit 894'). Pacific & Orient Insurance Co Bhd ('P&O') as the insurer had appointed Messrs VM Kumaran & Co ('VM Kumaran') to defend the defendant. Unknown to defendant, P&O filed an originating summons at the High Court and obtained a declaratory order that the insurance policy issued to the defendant in respect of the motorcycle was null and unenforceable. The declaratory order was applied purportedly based on the defendant's admission that he was never involved in the accident, that his initial police report for the accident was a false report, and that the plaintiff's claim was a fraud. Upon the instructions of P&O, VM Kumaran applied to be discharged from acting for the defendant. An interlocutory judgment in default was entered against the defendant and the plaintiff proceeded with the assessment of damages. The Sessions Court judge ('SCJ') ordered the defendant to pay a judgment sum of RM2.5m ('29 March 2017 judgment'). The plaintiff then filed a recovery action against P&O to demand the payment of the judgment sum. P&O subsequently filed a notice of application ('encl 25') for an order, inter alia, that: (a) leave be granted to P&O to intervene in Suit 894 as the second defendant; and (b) the 29 March 2017 judgment be set aside. On 25 May 2021, the SCJ dismissed encl 25 and P&O appealed to the High Court and was allowed on 26 September 2022. Dissatisfied, the plaintiff filed this Appeal 493 which was allowed where the court found that the sessions court was functus officio, as such P&O could no

longer intervene. Appeals 579 and 580 emanated from one civil action in the sessions court ('Suit 632'), arising from an accident occurred between both parties. The fact for the two appeals was identical with Appeal 493, inter alia, on the discharge of solicitor on the ground of fraud. A judgment in default was entered against the defendant in Suit 632 ('28 September 2017 judgment'). P&O had filed two applications in the sessions court ie encl 28 and encl 40 to intervene Suit 632 and for the 28 September 2017 judgment to be set aside. Both applications in encls 28 and 40 was dismissed but was allowed by the High Court on 22 November 2022 upon appeals by P&O. Dissatisfied, the plaintiffs in Suit 632 filed these Appeals 579 and 580. The court had affirmed the High Court order with a variation that the matter be remitted to the sessions court for trial with the insured as the first defendant and P&O as the second defendant. The plaintiffs in Suit 632 and P&O filed review applications against the court's decisions. The review applications were allowed by the review panel which found that there was no estoppel or res judicata issue as all issues were live issues to be determined at the re-hearing of the appeals. Hence, this re-hearing of the three appeals. The issues for consideration were: (i) whether the High Court's orders dated 26 September 2022 and 22 November 2022 were not a ruling and 'non-speaking' judgments; (ii) whether P&O could intervene in the negligence suit; (iii) whether the sessions court's proceeding had concluded; (iv) whether P&O was estopped from filing encls 25, 28 and 40; (v) whether the High Court's policy invalidation order and dismissal of P&O's suit had any effect; and (vi) whether P&O had abused the court's process.

Held, dismissing the appeals:

(1) When the High Court heard the appeal, it was sitting as an appellate court exercising its appellate jurisdiction over the sessions court's orders dated 25 May 2021 and 28 September 2017, respectively. There was no preliminary issue at the hearing of the appeal that required the High Court to make a ruling. The three High Court's decisions fell within the definition of 'decision' in s 3 of the Courts of Judicature Act 1964 ('the CJA'). This was because if the three appeals were allowed by the Court of Appeal ('COA') ie P&O could not intervene in the negligence suit and could not set aside the sessions court's judgment, the plaintiffs could then enforce directly the sessions court's judgment against P&O under s 96(1) of the Road Transport Act 1987 ('the RTA'). In such an event, the rights of the plaintiffs and P&O were finally disposed of within the meaning of the term 'decision' in s 3 of the CJA. Consequently, the three High Court's decisions were final 'orders' in the definition of 'decision' in s 3 of the CJA, which were appealable to the COA under s 67(1) of the CJA. The three grounds of judgments ('GOJs') of the High Court were non-speaking judgments. However, the COA should not intervene and allow the three appeals (see paras 22 & 26–28).

(2) P&O had a right to intervene. In view of the insurer's statutory liability under s 96(1) of the RTA, it was 'necessary' for P&O to intervene in the negligence suit under O 15 r 6(2)(b)(i) of the Rules of Court 2012 ('ROC'). By virtue of O 15 r 6(2)(b)(ii) of the ROC, with regard to the relief claimed by the plaintiffs against the defendant in the negligence suit, there existed a question between, P&O on the one hand; and the plaintiffs and defendant on the other hand, on whether a fraudulent negligence suit had been instituted by the plaintiffs for which it would be just and convenient to determine the question between P&O/plaintiffs/defendant. In accordance with O 1A and O 2 r 1 (2) of the ROC, it was just for P&O to intervene in the negligence suit so as to ensure that the sessions court could decide whether the negligence suit had been fraudulently filed by the plaintiffs. P&O had a right to be heard regarding the P&O's averment (fraudulent negligence suit) before the sessions court decided the negligence suit more so, when no evidence had been adduced by the plaintiffs in the negligence suit regarding the 100% liability in negligence on the defendant's part (see paras 32–33).

(3) The sessions court was not functus officio when the SCJ heard encls 25, 28 and 40. Section 96(1) of the RTA had expressly provided for the insurer's statutory liability, which entitled it to intervene in the negligence suit (see para 38).

(4) P&O was not estopped by its conduct from proceeding with encls 25, 28 and 40. P&O's conduct was due solely to its discovery and was the only lawful option available to it. P&O could not allege fraud on the part of the defendant and, at the same time, continued to instruct the solicitors to act for the defendant in the negligence suit. P&O's conduct could not restrain, let alone estop it from exercising its right to resist the insurer's statutory liability under s 96(1) of the RTA based on the P&O's averment (fraudulent negligence suit). There was an inordinate delay of more than two years from the date of the sessions court's judgments before the plaintiffs demanded P&O to honour the judgments under s 96(1) of the RTA. Such inequitable conduct by the plaintiffs disentitled the plaintiffs from relying on the equitable doctrine of estoppel to support the three appeals (see paras 40–41).

(5) The High Court's policy invalidation order did not bind the plaintiffs because P&O did not cite the plaintiffs as co-defendants in the intervener's suit. As the plaintiffs had been deprived of their right to be heard in the suit, P&O could not rely on the High Court's policy invalidation order to resist the three appeals. Further, the High Court's dismissal of the intervener's suit was of no consequence to the three appeals because P&O's averment (fraudulent negligence suit) could only be tried in the sessions court. No evidence had been adduced in the

negligence suit. Therefore, the question between P&O/plaintiffs/defendant was still a live issue (see paras 42–43).

(6) The exercise of the P&O's right to resist the insurer's statutory liability under s 96(1) of the RTA could not constitute an abuse of court process, especially in light of P&O's discovery and averment (fraudulent negligence suit). More importantly, the sessions court had not commenced a trial to decide on the negligence suit and had yet to decide on P&O's averment (fraudulent negligence suit). Since the question between P&O/plaintiffs/defendant regarding P&O's averment (fraudulent negligence suit) was a live issue, the three appeals had not become academic (see paras 45–46).

[Bahasa Malaysia summary

Ketiga-tiga rayuan ini iaitu Rayuan 493, 579 dan 580 dikemukakan di hadapan mahkamah setelah diperintahkan untuk didengar semula oleh panel semakan terdahulu. Berkenaan dengan Rayuan 493, plaintif terlibat dalam kemalangan dengan defendan. Plaintif mengalami kecederaan parah dan memulakan tuntutan kecederaan peribadi dan kerugian kewangan terhadap defendan di mahkamah sesyen ('Saman 894'). Pacific & Orient Insurance Co Bhd ('P&O') sebagai penanggung insurans telah melantik Tetuan VM Kumaran & Co ('VM Kumaran') untuk membela defendan. Tanpa pengetahuan defendan, P&O telah memfailkan saman pemula di Mahkamah Tinggi dan memperoleh perintah pengisytiharan bahawa polisi insurans yang dikeluarkan kepada defendan berhubung dengan motosikal adalah batal dan tidak boleh dikuatkuasakan. Perintah pengisytiharan itu dipohon dipercayai berdasarkan pengakuan defendan bahawa dia tidak pernah terlibat dalam kemalangan itu, bahawa laporan polis awalnya mengenai kemalangan itu adalah laporan palsu, dan tuntutan plaintif adalah penipuan. Atas arahan P&O, VM Kumaran memohon untuk dilepaskan daripada bertindak untuk defendan. Penghakiman ingkar interlokutori telah dimasukkan terhadap defendan dan plaintif meneruskan dengan penilaian ganti rugi. Hakim mahkamah sesyen ('HMS') memerintahkan defendan membayar jumlah penghakiman sebanyak RM2.5 juta ('penghakiman 29 Mac 2017'). Plaintif kemudian memfailkan tindakan pemulihan terhadap P&O untuk menuntut pembayaran jumlah penghakiman. P&O kemudiannya memfailkan notis permohonan ('lampiran 25') untuk perintah, antara lain, bahawa: (a) kebenaran diberikan kepada P&O untuk campur tangan dalam Saman 894 sebagai defendan kedua; dan (b) penghakiman 29 Mac 2017 diketepikan. Pada 25 Mei 2021, HMS menolak lampiran 25 dan P&O merayu ke Mahkamah Tinggi dan dibenarkan pada 26 September 2022. Tidak berpuas hati, plaintif memfailkan Rayuan 493 ini yang dibenarkan di mana mahkamah mendapati bahawa mahkamah sesyen adalah functus officio, oleh itu P&O tidak lagi boleh campur tangan. Rayuan 579 dan 580 berpunca daripada satu tindakan sivil di mahkamah sesyen ('Saman 632'), yang timbul daripada kemalangan

A yang berlaku antara kedua-dua pihak. Fakta bagi kedua-dua rayuan adalah sama dengan Rayuan 493, antara lain, mengenai pelepasan peguam atas alasan penipuan. Penghakiman ingkar telah dimasukkan terhadap defendan dalam Saman 632 ('penghakiman 28 September 2017'). P&O telah memfailkan dua permohonan di mahkamah sesyen iaitu lampiran 28 dan lampiran 40 untuk campur tangan Saman 632 dan untuk penghakiman 28 September 2017 diketepikan. Kedua-dua permohonan dalam lampiran 28 dan 40 telah ditolak tetapi dibenarkan oleh Mahkamah Tinggi pada 22 November 2022 atas rayuan oleh P&O. Tidak berpuas hati, plaintif dalam Saman 632 memfailkan Rayuan 579 dan 580 ini. Mahkamah telah mengesahkan perintah Mahkamah Tinggi dengan variasi bahawa perkara itu dikembalikan ke mahkamah sesyen untuk perbicaraan dengan pihak yang diinsuranskan sebagai defendan pertama dan P&O sebagai defendan kedua. Plaintif dalam Saman 632 dan P&O memfailkan permohonan semakan terhadap keputusan mahkamah. Permohonan semakan telah dibenarkan oleh panel semakan yang mendapati bahawa tidak terdapat isu estoppel atau res judicata kerana semua isu adalah isu langsung untuk ditentukan pada pendengaran semula rayuan. Oleh itu, pendengaran semula ketiga-tiga rayuan ini. Isu-isu untuk pertimbangan adalah: (i) sama ada perintah Mahkamah Tinggi bertarikh 26 September 2022 dan 22 November 2022 bukan penghakiman yang memutuskan dan 'non-speaking'; (ii) sama ada P&O boleh campur tangan dalam saman kecuaian; (iii) sama ada prosiding mahkamah sesyen telah selesai; (iv) sama ada P&O dihalang daripada memfailkan lampiran 25, 28 dan 40; (v) sama ada perintah pembatalan polisi Mahkamah Tinggi dan penolakan saman P&O mempunyai sebarang kesan; dan (vi) sama ada P&O telah menyalahgunakan proses mahkamah.

Diputuskan, menolak rayuan-rayuan:

(1) Apabila Mahkamah Tinggi mendengar rayuan, ia bersidang sebagai mahkamah rayuan yang menjalankan bidang kuasa rayuannya ke atas perintah mahkamah sesyen bertarikh 25 Mei 2021 dan 28 September 2017. Tiada isu awalan pada pendengaran rayuan yang memerlukan Mahkamah Tinggi membuat keputusan. Ketiga-tiga keputusan Mahkamah Tinggi termasuk dalam definisi 'keputusan' dalam s 3 Akta Mahkamah Kehakiman ('AMK'). Ini kerana jika ketiga-tiga rayuan itu dibenarkan oleh Mahkamah Rayuan ('MR'), iaitu P&O tidak boleh campur tangan dalam saman kecuaian dan tidak boleh mengetepikan penghakiman mahkamah sesyen, plaintif kemudian boleh menguatkuasakan secara langsung penghakiman mahkamah sesyen terhadap P&O di bawah s 96(1) Akta Pengangkutan Jalan 1987 ('APJ'). Dalam keadaan sedemikian, hak plaintif dan P&O akhirnya dilupuskan dalam maksud istilah 'keputusan' dalam s 3 AMK. Akibatnya, ketiga-tiga keputusan Mahkamah Tinggi adalah 'perintah' muktamad dalam definisi 'keputusan' dalam s 3 AMK, yang boleh dirayu kepada MR di bawah

s 67(1) AMK. Ketiga-tiga alasan penghakiman ('GOJ') Mahkamah Tinggi adalah penghakiman 'non-speaking'. Walau bagaimanapun, MR tidak seharusnya campur tangan dan membenarkan ketiga-tiga rayuan itu (lihat perenggan 22 & 26–28).

(2) P&O mempunyai hak untuk campur tangan. Memandangkan liabiliti berkanun penanggung insurans di bawah s 96(1) APJ, adalah 'perlu' bagi P&O untuk campur tangan dalam saman kecuaian di bawah A 15 k 6(2)(b)(i) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Berdasarkan A 15 k 6(2)(b)(ii) KKM, berkenaan dengan relif yang dituntut oleh plaintif terhadap defendan dalam saman kecuaian, wujud persoalan antara, P&O di satu pihak; dan plaintif dan defendan di pihak yang lain, sama ada saman kecuaian penipuan telah dimulakan oleh plaintif yang mana adalah adil dan wajar untuk menentukan persoalan antara P&O/plaintif/defendan. Selaras dengan A 1A dan A 2 k 1(2) KKM, adalah adil bagi P&O untuk campur tangan dalam saman kecuaian untuk memastikan bahawa mahkamah sesyen boleh memutuskan sama ada saman kecuaian itu telah difailkan secara penipuan oleh plaintif. P&O mempunyai hak untuk didengar mengenai dakwaan P&O (saman kecuaian penipuan) sebelum mahkamah sesyen memutuskan saman kecuaian lebih-lebih lagi, apabila tiada bukti telah dikemukakan oleh plaintif dalam saman kecuaian mengenai liabiliti 100% dalam kecuaian di pihak defendan (lihat perenggan 32–33).

(3) Mahkamah sesyen tidak *functus officio* apabila HMS mendengar lampiran 25, 28 dan 40. Seksyen 96(1) APJ telah secara jelas memperuntukkan liabiliti berkanun penanggung insurans, yang membolehkannya campur tangan dalam saman kecuaian (lihat perenggan 38).

(4) P&O tidak dihalang oleh kelakuannya daripada meneruskan lampiran 25, 28 dan 40. Kelakuan P&O adalah semata-mata disebabkan oleh penemuan dan merupakan satu-satunya pilihan yang sah yang tersedia baginya. P&O tidak boleh mendakwa penipuan di pihak defendan dan, pada masa yang sama, terus mengarahkan peguam untuk bertindak bagi pihak defendan dalam saman kecuaian. Kelakuan P&O tidak boleh menyekat, apatah lagi menghalangnya daripada melaksanakan haknya untuk menentang liabiliti berkanun penanggung insurans di bawah s 96(1) APJ berdasarkan dakwaan P&O (saman kecuaian penipuan). Terdapat kelewatan yang berlebihan selama lebih daripada dua tahun dari tarikh penghakiman mahkamah sesyen sebelum plaintif menuntut P&O untuk mematuhi penghakiman di bawah s 96(1) APJ. Kelakuan tidak adil sedemikian oleh plaintif menghilangkan kelayakan plaintif daripada bergantung pada doktrin ekuiti estoppel untuk menyokong ketiga-tiga rayuan itu (lihat perenggan 40–41).

(5) Perintah pembatalan polisi Mahkamah Tinggi tidak mengikat plaintif

kerana P&O tidak menamakan plaintif sebagai defendan bersama dalam saman pencelah. Oleh kerana plaintif telah dinafikan hak mereka untuk didengar dalam saman itu, P&O tidak boleh bergantung pada perintah pembatalan polisi Mahkamah Tinggi untuk menentang ketiga-tiga rayuan itu. Selanjutnya, penolakan saman pencelah oleh Mahkamah Tinggi tidak memberi kesan kepada ketiga-tiga rayuan itu kerana dakwaan P&O (saman kecuaian penipuan) hanya boleh dibicarakan di mahkamah sesyen. Tiada bukti telah dikemukakan dalam saman kecuaian. Oleh itu, persoalan antara P&O/plaintif/defendan masih merupakan isu langsung (lihat perenggan 42–43).

(6) Pelaksanaan hak P&O untuk menentang liabiliti berkanun penanggung insurans di bawah s 96(1) APJ tidak boleh menjadi penyalahgunaan proses mahkamah, terutamanya memandangkan penemuan dan dakwaan P&O (saman kecuaian penipuan). Lebih penting lagi, mahkamah sesyen belum memulakan perbicaraan untuk membuat keputusan mengenai saman kecuaian dan belum memutuskan dakwaan P&O (saman kecuaian penipuan). Oleh kerana persoalan antara P&O/plaintif/defendan mengenai dakwaan P&O (saman kecuaian penipuan) adalah isu langsung, ketiga-tiga rayuan itu tidak menjadi akademik (lihat perenggan 45–46).]

Cases referred to

AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals [2022] 5 MLJ 825; [2022] 6 MLRA 224; [2022] 8 CLJ 175; [2022] 6 AMR 1, FC (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 1 MLRA 535; [2018] 3 CLJ 427; [2018] 1 AMR 209, FC (folld)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121; [2007] 3 MLRA 150, FC (distd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374; [1996] 1 MLRA 171; [1996] 2 CLJ 586; [1996] 1 AMR 908, FC (refd)

Toh Seow Ngan & Ors v Toh Seak Keng & Ors [1990] 2 MLJ 303; [1990] 1 MLRA 292; [1990] 1 CLJ Rep 286; [1990] 2 MLJ 303, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 67(1)

Road Transport Act 1987 s 96(1), (2), (3)

Rules of Court 2012 O 1A, O 2 r 1(2), O 4 r 6(2), O 15 r 4(1), (3), 6(2), (2)(b)(i), (2)(b)(ii)

Rules of the Court of Appeal 1994 r 105

Appeal from: *Pacific & Orient Insurance Co Bhd v Gunalan a/l Pechimutu & Anor* [2023] MLJU 598 (High Court, Johor Bahru)

Soosay Nathan (with GK Ganesan, G Naidu, Teo Han Ley, Lee Yen Yee, Jusween Kaur, and TP Vaani) (Teo & Assoc) in Civil Appeal No J-04(IM)-493–10 of 2022 for the appellant.

Soosay Nathan (with GK Ganesan, G Naidu, Teo Han Ley, Lee Yen Yee, Jusween Kaur, and TP Vaani) (Teo & Assoc) in Civil Appeal Nos J-04(IM)-579–12 of 2022 and J-04(IM)-580–12 of 2022 for the appellant.

Kamalanathan Ratnam (with Vinod a/l R Kamalanathan and Muhammad Azim Akif bin Saiful Bahari) (Vinod Kamalanathan & Assoc) in Civil Appeal No J-04(IM)-493–10 of 2022 for the first respondent.

Lee Sooi Kee (SK Lee) in Civil Appeal No J-04(IM)-493–10 of 2022 for the second respondent.

Kamalanathan Ratnam (with Vinod a/l R Kamalanathan and Muhammad Azim Akif bin Saiful Bahari) (Vinod Kamalanathan & Assoc) in Civil Appeal Nos J-04(IM)-579–12 of 2022 and J-04(IM)-580–12 of 2022 for the first respondent.

Not represented in Civil Appeal Nos J-04(IM)-579–12 of 2022 and J-04(IM)-580–12 of 2022 for the second respondent.

Ahmad Kamal JCA:

INTRODUCTION

[1] These three appeals came before us after being ordered to be re-heard by the earlier review panel. As a matter of house-keeping, we set out herein the chronology of events surrounding these appeals:

(a) on 1 December 2023, this court, consists the panel of Justice Vazeer Alam bin Mydin Meera, Justice Azimah bt Omar and Justice Wong Kian Kheong ('first COA panel') dismissed Appeals J-04(IM)-579–12 of 2022 ('Appeal 579') and J-04(IM)-580–12 of 2022 ('Appeal 580'). The first COA panel had affirmed the order of the High Court with variation that the matter be remitted to the sessions court for trial with the insured as the first defendant and the insurer as the second defendant;

(b) on 11 December 2023, the panel comprised of Justice Hadhariah bt Syed Ismail, Justice Hj Azman bin Abdullah, and Justice Azmi bin Ariffin ('second COA panel') allowed Appeal J-04(iM)-493–10 of 2022 ('Appeal 493') and found that the sessions court is functus officio, as such the first respondent ie Pacific & Orient Insurance Co Bhd ('P&O') can no longer intervene;

(c) on 3 January 2024, appellants in Appeal 579 and Appeal 580 filed in this court two separate review applications under r 105 of the Rules of the Court of Appeal 1994. For Appeal 579, the review application was

registered as J-08(Review)-2–01 of 2024 ('review 2'), while for Appeal 580, the review application was registered as J-08(Review)-1–01 of 2024 ('review 1');

(d) on 15 January 2024, respondent in Appeal 493 also filed a review application and registered as J-08(Review)-4–01 of 2024 ('review 4');

(e) on 2 August 2024, a panel chaired by Justice S Nantha Balan, sat together with Justice Lim Chong Fong and Justice Azizul Azmi bin Adnan ('review panel') heard all the above-mentioned three review applications. The review panel decided to allow all those three review applications with further order that there is no estoppel or res judicata issue as all issues are live issues to be determined at the re-hearing of the said appeals. All the three appeals are to be heard together before a new, one panel.

[2] This is how these three appeals come before us which we heard those three together on 24 October 2024. We reserved our decision for careful deliberation, and this is now our decision.

BACKGROUND FACTS

Appeal 493

[3] On 17 December 2014, the plaintiff was collided by the defendant in an accident. The plaintiff suffered severe injuries and commenced personal injuries and pecuniary losses claim against the defendant via civil suit No A53KJ-894–10 of 2015 ('Suit 894') at the sessions court of Johor Bahru.

[4] On 19 November 2015, Messrs VM Kumaran & Co was appointed by P&O to defend the defendant and subsequently, filed the defence of the defendant. Unknown to defendant, on 16 June 2016, P&O filed Originating Summons No WA-24NCC-259–06 of 2016 ('OS 259') at the Kuala Lumpur High Court and obtained a declaratory order dated 19 July 2016, which declared that the insurance policy issued to the defendant in respect of motorcycle No JQM 3044 is null and unenforceable. The plaintiff was not named as a party in the OS 259. The declaratory order was applied purportedly based on the defendant's admission that he was never involved in the said accident, that his initial police report admitting to the accident was a false report, and that the plaintiff's claim was a fraud.

[5] On 15 September 2016, upon the instructions of P&O, Messrs VM Kumaran & Co applied to discharge themselves from acting for the defendant. The sessions court judge ('SCJ') granted order in terms on 23 November 2016.

[6] On 7 February 2017, an interlocutory judgment in default was entered against the defendant. The plaintiff thereafter proceeded with the assessment of damages. On 29 March 2017, the SCJ entered the said judgment against the defendant.

[7] On 18 September 2020, the plaintiff filed a recovery action against P&O vide Originating Summons No JA-24NCVC-526–09 of 2020 at the Johor Bahru High Court, demanding P&O to pay the judgment sum of RM2.5m ordered by the SCJ in the judgment dated 29 March 2017.

[8] On 5 October 2020, P&O filed a notice of application in encl 25 ('encl 25') under O 15 r 4(1) and/or O 4 r 6(2) and O 15 r 4(3) of the Rules of Court 2012 ('the ROC') in Suit 894 for an order, inter alia, that leave be granted to P&O to intervene in the sessions court's proceeding as the second defendant; and that the sessions court's order dated 29 March 2017 be set aside.

[9] On 25 May 2021, the learned SCJ dismissed encl 25 for, among others, the following reasons:

(a) P&O had cited the incorrect provisions of the ROC with respect to encl 25;

(b) the proceedings had concluded;

(c) P&O was estopped from intervening in the proceedings below by their previous conduct in discharging their solicitors from defending the defendant against the plaintiff's claims; and

(d) the sessions court was not the correct forum to ventilate P&O's allegation of fraud. P&O ought to have taken out separate proceedings to set aside the judgment dated 29 March 2017 on the grounds of purported fraud.

[10] On 5 July 2021, P&O appealed to the High Court against the decision of the SCJ on 25 May 2021. On 26 September 2022, the learned High Court judge ('HCJ') allowed P&O's appeal and made, among others, the following orders:

(a) leave is granted to P&O to intervene and to be made the second defendant in the sessions court's proceedings; and

(b) the matter be remitted to the sessions court to hear P&O's application to set aside the judgment in default dated 29 March 2017.

[11] Dissatisfied, the plaintiff filed this Appeal 493 which was heard before the second COA panel as mentioned above. To recap, Appeal 493 was allowed and the second COA panel found that the sessions court is functus officio, as such P&O can no longer intervene.

[12] This decision brings to the review application and subsequently, a re-hearing of this Appeal 493 before us.

Appeals 579 and 580

[13] Appeals 579 and 580 emanate from one civil action in the sessions court ie JA-A53KJ-632–09 of 2016 ('Suit 632'), arising from an accident occurred between both parties.

[14] The fact of the case for these two appeals is more or less identical with Appeal 493, inter alia, on the discharge of solicitor ie Messrs SK Lee, on the ground of fraud, based on finding of the High Court vide Originating Summons WA-24NCC-537–12 of 2016 (OS 537).

[15] To cut it short, P&O had filed two applications in the sessions court, namely:

(a) encl 28 ('encl 28') — application to intervene in Suit 632 and stay of execution of sessions court's judgment dated 28 September 2017 until the hearing and disposal of encl 40; and

(b) encl 40 ('encl 40') — application to intervene in Suit 632 and that the sessions court's judgment dated 28 September 2017 be set aside.

[16] The sessions court's judgment dated 28 September 2017 is basically the judgment in default entered against the defendant in this Suit 632.

[17] The SCJ had, on 25 May 2021, dismissed both applications in encls 28 and 40, leading to two appeals in the High Court by P&O, ie Civil Appeal No JA-12A-25–07 of 2021 (in respect of encl 28) and Civil Appeal No JA-12A-26–07 of 2021 (in respect of encl 40).

[18] The HCJ had, on 22 November 2022 allowed both P&O's appeals and held, among others, '... The matter was merely sent back to the sessions court for the application to set aside the judgment in default to be made and heard on the merits'.

[19] Dissatisfied, the plaintiffs in Suit 632 filed the present Appeals 579 and 580 before the first COA panel. To recap, the first COA panel had affirmed the order of the High Court with a variation that the matter be remitted to the sessions court for trial with the insured as the first defendant and P&O as the second defendant.

[20] This decision led to the review applications namely, review 1 and 2, and consequently the re-hearing before us.

THE RE-HEARING OF THE APPEAL

[21] Before us, the identical issues raised were as follows:

(a) whether the High Court orders dated 26 September 2022 and 22 November 2022 are not a ruling and 'non-speaking' judgments;

(b) whether the P&O can intervene in the negligence suit;

(c) whether the sessions court's proceeding had concluded;

(d) whether the P&O was estopped from filing encls 25, 28 and 40;

(e) what is the effect of the High Court's policy invalidation order and High Court's dismissal ('P&O's suit'); and

(f) did the P&O abuse the court process.

OUR FINDINGS

Whether the High Court orders dated 26 September 2022 and 22 November 2022 are not a ruling and 'non-speaking' judgment

[22] On this issue, we find that when the High Court heard the appeal, it was sitting as an appellate court exercising its appellate jurisdiction over the sessions court's orders dated 25 May 2021 and 28 September 2017, respectively. There was no preliminary issue at the hearing of the appeal that required the HCJ to make a ruling.

[23] The High Court, on 26 September 2022, allowed P&O's appeal ('encl 25') and made, among others, the following orders:

(a) leave is granted to P&O to intervene and to be made the second defendant in the sessions court's proceedings; and

(b) the matter be remitted to the sessions court to hear P&O's application to set aside the judgement in default dated 29 March 2017.

[24] On 22 November 2022, the learned HCJ:

(a) allowed P&O's appeal ('encl 28') as follows, among others:

(i) P&O was allowed to intervene in the negligence suit; and

(ii) the plaintiffs shall pay costs of RM2,500 to P&O,
(High Court's decision (encl 28)).

(b) allowed P&O's appeal ('encl 40') with the following order:

(i) encl 40 was remitted to the sessions court to decide whether the sessions court's judgment should be set aside; and

(ii) costs of RM2,500 shall be paid by the plaintiffs to P&O, (High Court's decision (encl 40)).

[25] The question to be decided by this court is whether the three High Court's decisions ('encls 25, 28, and 40') finally dispose of the rights of the plaintiffs and P&O within the meaning of the term 'decision' in s 3 of the Courts of Judicature Act 1964 ('the CJA').

[26] We are of the view that the three High Court's decisions (encls 25, 28, and 40) fall within the definition of 'decision' in s 3 of the CJA. This is because if the three appeals are allowed by the Court of Appeal ('COA'), ie, the P&O cannot intervene in the negligence suit and cannot set aside the sessions court's judgment, the plaintiffs can then enforce directly the sessions court's judgment against the P&O under s 96(1) of the Road Transport Act 1987 ('the RTA'). In such an event, the rights of the plaintiffs and P&O are finally disposed of within the meaning of the term 'decision' in s 3 of the CJA. Consequently, the three High Court's decisions (encls 25, 28, and 40) are final 'orders' in the definition of 'decision' in s 3 of the CJA, which are appealable to the COA under s 67(1) of the CJA.

Non-speaking judgment

[27] Upon perusal of the three grounds of judgments ('GOJs)' (encls 25, 28, and 40) of the High Court, we are of the view that the three GOJs were non-speaking judgments.

[28] Having said so, we are of the opinion that we cannot agree to the submission by the plaintiffs learned counsel that due to the fact that the three GOJs (encls 25, 28, and 40) had not provided any reason for the three High Court's decisions (encls 25, 28, and 40), the COA should intervene and allow these three appeals.

[29] Even though the High Court's judgments are not reasoned one, the COA as an appellate court has the judicial duty to decide on appeal by:

(a) going through the appeal records and the parties' written submissions; and

(b) listening to the oral submission by the learned counsel.

[30] We are guided by the Federal Court's decision in the case of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 1 MLRA 535; [2018] 3 CLJ 427; [2018] 1 AMR 209 when it held as follows:

[38] *We endorse the view of the Court of Appeal quoted above, and agree that the High*

Court judgment in the instant case was a non-speaking judgment one. Nevertheless, as elaborated below, it does not follow that a retrial or a rehearing should be ordered. (Emphasis added.)

Whether the proposed intervener (P&O) can intervene in the negligence suit

[31] Section 96(1) to (3) of the RTA provide as follows:

s 96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks.

(1) *If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.*

(2) *No sum shall be payable by an insurer under subsection (1) —*

(a) *in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;*

(b) in respect of any judgement, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) *No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court*

that the insurance was void or unenforceable: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (Emphasis added.)

[32] Given the above, we are of the considered view that the P&O had a right to intervene based on the following grounds:

(a) in view of the insurer's statutory liability under s 96(1) of the RTA, it was 'necessary' for P&O to intervene in the negligence suit under O 15 r 6(2)(b)(i) of the ROC so as to ensure that 'all matters in dispute in the (negligence suit) may be effectually and completely determined and adjudicated upon';

(b) by virtue of O 15 r 6(2)(b)(ii) of the ROC, with regard to the relief claimed by the plaintiffs against the defendant in the negligence suit, there existed a question between:

(i) the P&O on the one hand; and

(ii) the plaintiffs and defendant, on the other hand,

– on whether a fraudulent negligence suit had been instituted by the plaintiffs ('question (P&O/plaintiffs/defendant)') for which it would be just and convenient to determine the question (P&O/plaintiffs/defendant);

(c) O 15 r 6(2)(b)(i) and (ii) of the ROC should be 'widely or liberally interpreted' because such an interpretation ensures that all parties who have any interest in a claimant's suit (insured's liability), are brought before the sessions court trying the claimant's suit (insured's liability) so as to secure just, expeditious and economical disposal of the claimant's suit (insured liability); and

(d) in accordance with O 1A and O 2 r 1(2) of the ROC, it is just for P&O to intervene in the negligence suit so as to ensure that the sessions court can decide whether the negligence suit had been fraudulently filed by the plaintiffs.

(See *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 6 MLRA 224; [2022] 8 CLJ 175; [2022] 6 AMR 1 (FC).)

[33] We are of the considered view, in light of the insurer's statutory liability under s 96(1) of the RTA, P&O had a right to be heard regarding the P&O's

averment (fraudulent negligence suit) before the sessions court decided the negligence suit more so, when no evidence had been adduced by the plaintiffs in the negligence suit regarding the 100% liability in negligence on the defendant's part.

[34] The case laws seem to suggest that a judgment or order does not bind a party if the party has been deprived of the right to be heard before the judgment or order is made.

[35] In the case of *Toh Seow Ngan & Ors v Toh Seak Keng & Ors* [1990] 2 MLJ 303; [1990] 1 MLRA 292; [1990] 1 CLJ Rep 286; [1990] 2 MLJ 303, the then Supreme Court has decided as follows:

> [13] *... There is no denial that in breach of the rules of natural justice, the High Court had no jurisdiction to make the consent order affecting the rights of the appellants.*
>
> ...
>
> [14] *For the above reasons, we find the appellants are not estopped from challenging the validity of the consent order.* (Emphasis added.)

(See: *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 1 MLRA 171; [1996] 2 CLJ 586; [1996] 1 AMR 908 (FC).)

[36] We were referred to by the plaintiffs to support these three appeals to the Federal Court's case of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121; [2007] 3 MLRA 150 (*Staghorn*'s case). However, having perused the said judgment, we find that the *Staghorn*'s case can be distinguished from the instant case as follows:

(a) *Staghorn*'s case does not concern the insurer's statutory liability under s 96(1) of the RTA, which entitles P&O to intervene in the negligence suit;

(b) unlike *Staghorn*'s case, P&O had a right to be heard with regard to the P&O's averment (fraudulent negligence suit); and

(c) in *Staghorn*'s case, the order (land sale) was not procured by way of fraud.

Whether the sessions court's proceedings had been concluded

[37] The plaintiffs' learned counsel contended that the proceedings in the sessions court had been concluded with the perfection of the sessions court's judgment. As such, the sessions court was functus officio and could not hear encls 25, 28, and 40.

[38] We are of the view that the sessions court was not functus officio when the learned SCJ heard encls 25, 28, and 40. Section 96(1) of the RTA has expressly provided for the insurer's statutory liability, which entitles the intervener to intervene in the negligence suit. If we have applied the doctrine of functus officio to deny P&O the right to intervene in the negligence suit, this will be contrary to Parliament's intention in imposing the insurer's statutory liability under s 96(1) of the RTA.

Whether P&O was estopped from filing encls 25, 28, and 40

[39] The plaintiffs submit that P&O was estopped from obtaining the three High Court's decisions (encls 25, 28, and 40) due to the following reasons:

(a) P&O had appointed Messrs VM Kumaran & Co and Messrs SK Lee to act for the defendant in the negligence suit but subsequently instructed Messrs VM Kumaran & Co and Messrs SK Lee to cease to act for the defendant. Hence, the sessions court's decision; and

(b) P&O did not apply to intervene in the negligence suit before the plaintiffs obtained the sessions court's judgment.

[40] With respect, we do not agree. We are of the view that P&O is not estopped by its conduct from proceeding with encls 25, 28, and 40. This decision is premised on the following evidence and reasons:

(a) Messrs VM Kumaran & Co and Messrs SK Lee were initially appointed by P&O to act for the defendant in the negligence suit, this was understandable because generally (in the absence of fraud by, among others, the defendant), P&O would be liable under the policy to indemnify the defendant and to pay to the plaintiffs the judgment sum adjudged by the sessions court in the negligence suit pursuant to s 96(1) of the RTA;

(b) P&O's conduct was due solely to its discovery. More importantly, P&O's conduct was the only lawful option available to it. This was because P&O could not allege fraud on the part of the defendant and, at the same time, continued to instruct Messrs VM Kumaran & Co and Messrs SK Lee to act for the defendant in the negligence suit. Accordingly, P&O's conduct cannot restrain, let alone estop it from exercising its right to resist the insurer's statutory liability under s 96(1) of the RTA based on the P&O's averment (fraudulent negligence suit); and

(c) the doctrine of equitable estoppel is applied by courts so as to achieve justice. In this case, P&O had raised the P&O's averment (fraudulent negligence suit). If P&O is estopped by its conduct from raising the P&O's averment (fraudulent negligence suit), this will cause an injustice to P&O.

[41] In this case, the plaintiffs obtained the sessions court's judgment on 28 September 2017 ('Appeals 579 and 580') and on 29 March 2017 ('Appeal 493'). The plaintiffs only demanded P&O to pay the total sum of damages, interest, and costs on 28 August 2020 and 18 September 2020, respectively. There was an inordinate delay of more than two years from the date of the sessions court's judgments before the plaintiffs demanded P&O to honour the sessions court's judgments under s 96(1) of the RTA. Such inequitable conduct by the plaintiffs, in our view, disentitles the plaintiffs from relying on the equitable doctrine of estoppel to support these three appeals.

What is the effect of the High Court's policy invalidation order and the High Court's dismissal (P&O's suit)?

[42] The High Court's policy invalidation order does not bind the plaintiffs because P&O did not cite the plaintiffs as co-defendants in the intervener's suit (policy invalidation). As the plaintiffs had been deprived of their right to be heard in the intervener's suit (policy invalidation), P&O cannot rely on the High Court's policy invalidation order to resist these three appeals.

[43] We are of the view that the High Court's dismissal (intervener's suit) is of no consequence in these three appeals because P&O's averment (fraudulent negligence suit) can only be tried in the sessions court. It is to be emphasised that no evidence had been adduced in the negligence suit. In other words, the question (intervener/plaintiffs/defendant) is still a live issue.

Abuse of court process

[44] The plaintiffs submit that P&O had abused the court process by:

(a) filing encls 25, 28, and 40 in the negligence suit; and

(b) instituting the intervener's suit (plaintiffs) where P&O had obtained an interlocutory injunction from the High Court to restrain the plaintiffs from executing the sessions court's judgment until the High Court's disposal of the P&O's suit (plaintiffs) (P&O's interlocutory injunction (plaintiffs));

[45] We are of the view that the exercise of the P&O's right to resist the insurer's statutory liability under s 96(1) of the RTA cannot constitute an abuse of the court process, especially in light of P&O's discovery and P&O's averment (fraudulent negligence suit).

[46] More importantly, we find that the sessions court had not commenced a trial to decide the negligence suit and has yet to decide on P&O's averment (fraudulent negligence suit). It is crystal clear that the question

(P&O/plaintiffs/defendant) regarding the P&O's averment (fraudulent negligence suit) is a live issue. Therefore, we are of the view that P&O's three appeals (encls 25, 28 and 40) had not become academic.

CONCLUSION

[47] Premised on the above evidence and reasons, the three appeals are dismissed with the following order:

(a) P&O is allowed to intervene as the second defendant in the negligence suit;

(b) therefore, the sessions court's judgment in the respective appeals is set aside;

(c) the negligence suit is remitted to the sessions court for an early trial before another sessions court judge with liberty to all parties to:

(i) file further pleadings; and

(ii) obtain pre-trial case management directions from the sessions court judge.

(d) we make no order as to costs; and

(e) the case is fixed for case management in the sessions court at Johor Bharu on 24 March 2025 by way of e-review.

Appeals dismissed.

Reported by Nabilah Syahida Abdullah Salleh